Anwar et al v. Fairfield Greenwich Limited et al Doc. 307 Att. 2

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*,

Plaintiffs,

v.

FAIRFIELD GREENWICH LIMITED, *et al.*,

Defendants.

MASTER FILE NO. 09-CV-0118 (VM)

This Document Relates To:

09-CV-2366 (VM) (*Ferber* Action)
09-CV-2588 (VM) (*Pierce* Action)
09-CV-5012 (VM) (*Morning Mist* Action)
09-CV-5650 (VM) (*Sentry* Action)

DEFENDANT FGA'S OPPOSITION TO THE MOTIONS TO REMAND BY THE FERBER, PIERCE, MORNING MIST AND SENTRY PLAINTIFFS

July 27, 2009

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PRELIMINARY STATEMENT

Defendants' position is straightforward and required by the language and intent of the Class Action Fairness Act ("CAFA"). Claims brought by or for the benefit of hundreds of investors in funds associated with the Fairfield Greenwich Group to recover losses arising from the Madoff Ponzi scheme are "mass actions" under CAFA and therefore were properly removed to this Court. The question is one of first impression. There are no controlling cases addressing whether an action pled derivatively for the benefit of investors in a non-operating hedge fund, or brought by that fund itself for the benefit of those same investors, constitutes a "mass action" under CAFA. However, as set forth below, the plain text of CAFA and important public policy issues that led to its passage make clear that these cases, *Pierce*, *Ferber*, *Morning Mist*, and *Sentry* (the "Actions") are removable and should proceed in federal court.[1]

CAFA was broadly drafted to cover both actions (i) expressly pled as large "class actions", and, importantly, (ii) other actions on behalf of a large number of potential beneficiaries – denominated "mass actions" in the statute – where a plaintiff seeks relief for the benefit of investors through a mechanism other than a "class action." In enacting CAFA, Congress sought to prevent situations in which an action is "likely to become an 'orphan' that cannot be coordinated with similar class actions that are or, in the future, may be pending in federal court." S. Rep. No. 109-14, at 39 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 37.

The cases at issue here are precisely such actions. The Actions involve hundreds of millions of dollars and are brought for the benefit of investors throughout the country and, indeed, the world. They are precisely the sort of "interstate cases of national importance" that

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1 The *Pierce*, *Ferber* and *Morning Mist* Actions are brought by Derivative Plaintiffs, all represented by Milberg LLP. The *Sentry* Action is brought by Fairfield Sentry Limited (the "Fund") (with Derivative Plaintiffs, "Moving Plaintiffs"). *See* Exhibit A.

Congress intended to be heard in federal court when it passed CAFA. *Puglisi v. Citigroup Alternative Inv., LLC,* No. 08 CV 09774, 2009 WL 1515071, at *3 (S.D.N.Y. May 27, 2009) (citing 28 U.S.C. § 1711(b)(2)).

In its removal notices, Fairfield Greenwich Advisors LLC ("FGA") established the threshold requirements of CAFA: *i.e.*, that: (a) at least one member of the putative class is a citizen of a state different from at least one defendant or at least one member of the putative class is a citizen or subject of a foreign state and any defendant is a citizen of a U.S. state; (b) each action consists of at least 100 persons whose monetary relief claims are proposed to be tried jointly on the ground that the claims involve common questions of law or fact; and (c) the amount in controversy exceeds $5 million. *See* 28 U.S.C. §§ 1332(d), 1453. Plaintiffs cannot prove, as they must, that these requirements are not met, nor can they prevail on their other remand arguments.

The relief sought is not only unwarranted but also contradictory. In a July 21, 2009 telephone conference held by Magistrate Judge Katz with the parties in the consolidated *Anwar* action, counsel for Derivative Plaintiffs argued that the derivative claims should be heard only in state court, but simultaneously asked this Court to allow them to litigate in federal court any derivative claims that may be brought in a Second Consolidated Amended Complaint.

Derivative Plaintiffs' conflicting stance underscores the complexities and challenges of this litigation. Currently three different sets of plaintiffs (the Shareholder Class Plaintiffs, the Derivative Plaintiffs, and the Fund Plaintiff) representing the same large group of potential beneficiaries are vying to recover the same assets as compensation for the same alleged losses under various legal theories. Further complicating matters, the Trustee for Bernard L. Madoff Investment Securities, Inc. ("BLMIS") is likely to take the position here that any judgment or settlement paid is property of the Madoff estate. The overlapping and duplicative nature of the relief being sought is even clearer given that the Fairfield Greenwich funds at issue are no longer actively functioning or taking new investors and, as was discussed during the July 21 teleconference, a liquidator for the largest Fund has been appointed.

The relief sought by Moving Plaintiffs is not only unwarranted under CAFA but would undermine the coherent and orderly structure the Court has established to litigate the claims asserted against the Fairfield Greenwich Defendants arising out of the Madoff fraud. The remand motions should be denied.

BACKGROUND

On December 19, 2008, the first complaint in this consolidated action (*Anwar*) was filed in New York state court against certain of the Fairfield Greenwich Defendants and subsequently removed to this Court. A second action (*Pacific West*) was filed in this Court on January 8, 2009 and consolidated into *Anwar* on January 14, 2009. A third action (*Inter-American Trust*) was consolidated into *Anwar* on January 23, 2009.

On January 30, 2009, the Court entered the Consolidation Order and Order for Appointment of Co-Lead Counsel (the "Consolidation Order") and appointed as Interim Co-Lead Counsel the firms representing the *Anwar*, *Pacific West*, and *Inter-American Trust* plaintiffs.

Subsequent to entry of the Consolidation Order, Moving Plaintiffs in *Pierce*, *Ferber*, *Morning Mist* and *Sentry* filed their complaints in the Supreme Court for the State of New York. FGA timely removed each of those Actions to this Court. Pursuant to the Consolidation Order, and the Court's March 11, 2009 Civil Case Management Plan and Scheduling Order (the "CMO"), the Court consolidated each of the actions into *Anwar*. *See* Exhibit A.

On April 24, 2009, Interim Co-Lead Counsel in *Anwar* filed a Consolidated Amended Complaint (the "CAC"). The CAC did not assert claims under the federal securities laws or derivative claims. On June 8, 2009, Interim Co-Lead Counsel and counsel for defendants in *Anwar* submitted a stipulation, which the Court subsequently so-ordered, pursuant to which defendants consented to the service and filing by plaintiffs of a Second Consolidated Amended Complaint and agreed that defendants' time to answer, move against or otherwise respond to any complaint in *Anwar* would be adjourned until 45 days after service by plaintiffs of a Second Consolidated Amended Complaint.

On May 11, 2009, counsel for three sets of plaintiffs, including Interim Co-Lead Counsel, filed applications for appointment as lead counsel and lead plaintiff for federal securities law claims pursuant to the Private Securities Litigation Reform Act ("PSLRA"). On July 7, 2009, the Court appointed the *Anwar* Plaintiffs, represented by Interim Co-Lead Counsel (Boies, Schiller and Flexner LLP, Wolf Popper LLP, and Lovell Stewart Halebian LLP), as lead PSLRA plaintiffs and Interim Co-Lead Counsel as PSLRA lead counsel.

To date, the Court has consolidated a total of eleven cases into *Anwar* (*see* Exhibit B), and a multidistrict litigation proceeding has been initiated to transfer a twelfth case, *Headway Investment Corp. v. American Express Bank Ltd. d/b/a Standard Chartered Private Bank*, No. 09-21395-CMA (S.D. Fl.), to the Southern District of New York for consolidation into *Anwar*. Moving Plaintiffs now move to remand the Actions to State court.[2]

[2] Moving Plaintiffs also sought to vacate the Court's consolidation orders in the Actions, and counsel for Derivative Plaintiffs sought to be appointed Co-Lead Derivative Counsel. During the July 21, 2009 teleconference, Magistrate Judge Katz instructed the parties that only requests for remand would be briefed and addressed on the current briefing schedule. On July 22, 2009, Derivative Plaintiffs withdrew their motions to vacate consolidation of the Derivative Actions and to appoint Co-Lead Derivative Counsel.

ARGUMENT

I. THE ACTIONS SHOULD REMAIN IN FEDERAL COURT UNDER CAFA

CAFA extends federal diversity jurisdiction to actions that have minimal diversity, no fewer than 100 beneficial members of the plaintiff group, and at least $5,000,000 in controversy. It was drafted to encompass both actions expressly pled as large "class actions" and other actions with large numbers of potential beneficiaries denominated as "mass actions" – such as the Actions here – that like class actions potentially would benefit a large number of plaintiffs but have not been brought as class actions by plaintiffs.

In enacting CAFA, Congress noted that one of its purposes was to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction[.]" 28 U.S.C. § 1711(b)(2). Congress emphasized its belief that "the federal courts are the most appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs and have significant implications for interstate commerce and national policy." S. Rep. No. 109-14, at 27 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 27. As such, CAFA corrected "a flaw in the current diversity jurisdiction statute" (*id.*) by creating another basis to remove "securities cases that have national impact" from state courts. *Estate of Pew* v. *Cardarelli*, 527 F.3d 25, 26 (2d Cir. 2008). CAFA's jurisdictional provisions "should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if removed by any defendant." *New Jersey Carpenters Vacation Fund v. HarborView Mortg. Loan Trust 2006-4*, 581 F. Supp. 2d 581, 585 (S.D.N.Y. 2008) (quoting 151 Cong. Rec. H732-01, H-730 (Feb. 17, 2005) (statement of Congressman Goodlatte)); *see also In re Textainer P'ship Sec.*

Litig., No. C 05-0969 (MMC), 2005 WL 1791559, at *3 (N.D. Cal. July 27, 2005) (quoting same statement).

Ferber, *Pierce*, *Morning Mist*, and *Sentry* are precisely the sort of "interstate cases of national importance" that Congress intended to be heard in federal court when it passed CAFA. *Puglisi,* 2009 WL 1515071, at *3 (citing 28 U.S.C. § 1711(b)(2)). They concern the impact of the Madoff fraud on a large nationwide (and, indeed, global) group of investors and involve hundreds of millions of dollars.

The Actions certainly resemble class actions for purposes of CAFA.[3] Derivative Plaintiffs purport to bring their Actions "in the name of and for the benefit of [the partnerships] and [their] Limited Partners..."[4] *See, e.g.*, *Ferber* Complaint ¶ 1; *Pierce* Complaint ¶ 2; *Morning Mist* Complaint ¶ 1. Similarly, *Sentry,* while brought by the Fund itself (which now is in liquidation), is essentially an action to recover losses on behalf of the shareholders of the Fund. The circumstance that these claims are not brought and labeled as "class action claims" is not dispositive of whether they can be removed to this Court pursuant to CAFA. Indeed, as

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3 The Senate Judiciary Committee's Report on CAFA ("Committee Report") confirms that the term "class action" should be defined broadly:

> [T]he Committee notes that as with the other elements of Section 1332(d), the overall intent of these provisions is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications. In that regard, the Committee further notes that *the definition of "class action" is to be interpreted liberally. Its application should not be confined solely to lawsuits that are labeled "class actions" by the named plaintiff* or the state rulemaking authority. Generally speaking, lawsuits that resemble a purported class action should be considered class action for the purpose of applying these provisions.

S. Rep. No. 109-14, at 35 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 34 (emphasis added).

4 Counsel for Derivative Plaintiffs publicly have stated that they are "ditching the class action for derivative actions" because class actions "are absolutely going nowhere" and "are guaranteed to get dismissed" and because derivative actions are "the only type of lawsuit that's going to succeed and actually go someplace." AmLaw Daily, "Milberg's Brad Friedman: Madoff Concessions 'A Drop in the Ocean'," Mar. 4, 2009.

noted *supra*, Congress specifically enacted CAFA to prevent plaintiffs from circumventing federal subject matter jurisdiction through artful pleading. Removal of these Actions is encompassed within CAFA's language and purpose.

A. Moving Plaintiffs Cannot Meet Their Burden on Remand

FGA has established the threshold requirements of CAFA in each of the Actions: (a) at least one member of the putative class is a citizen of a state different from at least one defendant or at least one member of the putative class is a citizen or subject of a foreign state and any defendant is a citizen of a U.S. state; (b) each action consists of at least 100 persons whose monetary relief claims are proposed to be tried jointly on the ground that the claims involve common questions of law or fact; and (c) the amount in controversy exceeds $5 million. *See* 28 U.S.C. §§ 1332(d), 1453. No more is required.

Moving Plaintiffs concede that the diversity requirement and the $5 million amount in controversy requirement of CAFA are met in each of the Actions. They take issue only with the 100-person requirement. According to Derivative Plaintiffs, the 100-person requirement is not met in *Ferber*, *Pierce*, and *Morning Mist* because they are derivative actions each brought by only one or two named plaintiffs. Similarly, the Fund argues that the 100-person requirement is not met in *Sentry* because its claims are direct, even though those claims are brought by a non-operating Fund solely for the benefit of the Fund's over 700 shareholders.

Moving Plaintiffs also argue that specific exceptions to CAFA apply: (1) that the $75,000 jurisdictional requirement under 28 U.S.C. § 1332(a) is not met,[5] and (2) that the "internal affairs" doctrine applies. As demonstrated below, each of Moving Plaintiffs' arguments fails, and the Actions should remain in this Court.

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[5] This argument is advanced only by Derivative Plaintiffs.

1. The Actions Are Mass Actions Under CAFA[6]

CAFA establishes federal jurisdiction over "mass actions" by providing that a "mass action shall be deemed a class action" and subject to CAFA's provisions if it otherwise satisfies the requirements of the statute outlined in 28 U.S.C. §§ 1332(d)(2)-(10). 28 U.S.C. § 1332(d)(11)(A).[7] CAFA describes a "mass action" as "any civil action…in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a)." 28 U.S.C. § 1332(d)(11)(B)(i).

(a) The Derivative Actions Are Mass Actions Under CAFA

The crux of Derivative Plaintiffs' argument is that the derivative actions cannot be mass actions because, as derivative actions, they "do[] not assert individual claims (monetary or otherwise) of 100 persons – much less claims of 100 persons that are proposed to be tried jointly." Memorandum in Support of Remand in *Ferber* ("*Ferber* Memo.") at 5; Memorandum in Support of Remand in *Pierce* ("*Pierce* Memo.") at 6; Memorandum in Support of Remand in *Morning Mist* ("*Morning Mist* Memo.") at 6.

Derivative Plaintiffs cite no authority whatsoever holding that a derivative action on behalf of the limited partners of a partnership is not a "mass action" under CAFA, and we are

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6 This brief addresses the issue of whether the Actions are mass actions for purposes of CAFA. It does not address whether the class claims can be sustained given that the alleged injury to the class members is derivative to the injury to the companies. That issue will be addressed in FGA's motion to dismiss the Second Consolidated Amended Complaint.

7 As the Senate Judiciary Committee noted, mass actions "involve a lot of people who want their claims adjudicated together and they often result in the same abuses as class actions." S. Rep. No. 109-14, at 47 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 44.

aware of no such authority.[8] Instead, they identify cases that highlight the difference between direct and derivative claims. But these cases have nothing to say about the issue here. Whether a claim is direct or derivative is not the relevant question. The question is whether the complaint is brought in an effort to try the claims of 100 or more persons jointly. Here, the answer to that question is plainly yes.

Derivative Plaintiffs actually allege that defendants' conduct harmed the funds (Greenwich Sentry, Greenwich Sentry Partners, and Fairfield Sentry), *and their limited partners*, and consequently they seek to recover *for the benefit of those limited partners. See, e.g., Ferber* Complaint ¶ 1 ("This action is brought in the name of and for the benefit of GS *and its Limited Partners…*") (emphasis added); *Pierce* Complaint ¶ 2 ("This action is brought in the name of and for the benefit of GSP *and its Limited Partners…*"); *Morning Mist* Complaint ¶ 1 ("This is a derivative action brought by Plaintiffs, who are shareholders of Fairfield Sentry."). Thus the Derivative Complaints on their face make clear that the Derivative Actions are brought for the benefit of investors in the funds. *See, e.g., Beck v. Dobrowski*, 559 F.3d 680, 687 (7th Cir. Mar. 20, 2009) ("Because it is a derivative suit, a favorable judgment would accrue to all the shareholders...").

Importantly, the text of CAFA implicitly rejects the Derivative Plaintiffs' argument that derivative cases by their nature are excluded from coverage under the statute. Unlike the

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[8] Moving Plaintiffs argue that in addition to remand, costs and attorneys fees should be awarded. District courts repeatedly have declined to award attorneys' fees in connection with a removal effected in good faith. *See, e.g., Genton v. Vestin Realty Mortgage II, Inc.*, No. 06 Civ. 2517-BEN (WMC), 2007 WL 951838, at *3 (S.D. Cal. Mar. 9, 2007) (declining to grant award of attorneys' fees in connection with removal under CAFA and noting that "[v]ery little case law" exists regarding the exceptions to CAFA); *Carmona v. Bryant*, No. 06 Civ. 78-S (BLW), 2006 WL 1043987, at *3 (D. Idaho Apr. 19, 2006) (same); *Ind. State Dist. Council of Laborers & Hod Carriers Pension Fund v. Renal Care Group, Inc.*, No. Civ. 3:05-0451, 2005 WL 2000658, at *2 (M.D. Tenn. Aug. 18, 2005) (same). Here, where neither side has found controlling authority, any fee award plainly is unwarranted.

Securities Litigation Uniform Standards Act ("SLUSA"), which explicitly precludes from removal "an exclusively derivative action brought by one or more shareholders on behalf of a corporation" 15 U.S.C. §§ 77p, 78bb, ***CAFA does not carve out derivative actions***. Explicit exclusion of derivative actions in SLUSA coupled with no such exclusion in CAFA, a statute covering similar subject matter and passed in a similar time period, clearly implies that Congress did not intend to exclude derivative claims from coverage under CAFA. *C.f. Sung v. Wasserstein*, 415 F. Supp. 2d 393, 408 (S.D.N.Y 2006) (Marrero, J.) (derivative action was not subject to removal under SLUSA specifically because, unlike CAFA, SLUSA explicitly precludes derivative claims from removal).

Derivative Plaintiffs also argue, with respect to *Pierce*, that the 100-person requirement is not satisfied because, they assert, "the Fund has just 29 current limited partners, and 5 former limited partners." *Pierce* Memo at p. 5. Plaintiffs are incorrect, as set forth in the Declaration of Paul J. Sirkis, dated July 27, 2009, ("Sirkis Declaration")[9] filed herewith. The Sirkis Declaration sets forth the results of the jurisdictional discovery ordered by the Court on the number and identity of the beneficial owners of Greenwich Sentry Partners ("GSP"), the partnership on behalf of which Plaintiffs in *Pierce* purport to bring their action. As set forth in the Sirkis Declaration, the number of beneficial owners of GSP's 29 current limited partners is at least 111, *i.e.*, 11 more than is needed to meet the statutory minimum of 100. If former limited partners are included, who presumably are among the underlying claimants in the case, the total number of beneficial owners of GSP is even greater – at least 169.

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[9] The Motion to Strike the Declaration of Michael Thorne, dated July 27, 2009 filed in connection with the removal of *Pierce* is now moot. *See, e.g., Willingham v. Morgan*, 395 U.S. 402, 407 n.3 (1969) ("[I]t is proper to treat the removal petition as if it had been amended to include the relevant information contained in the later-filed affidavits"); *see also Mora v. Harley-Davidson Credit Corp.*, No. 1:09 Civ. 01453 OWW GSA, 2009 WL 464465, at *4 (E.D. Cal. Feb. 24, 2009) (same); *Ava Acupuncture P.C. v. State Farm Mut. Auto. Ins. Co.*, 592 F. Supp. 2d 522, 529 n.49 (S.D.N.Y. 2008) (relying on revised affidavit filed with defendant's remand opposition papers after plaintiffs alleged that affidavit filed with notice of removal was deficient).

(b) The Sentry Action Also Is A Mass Action

Similar to the Derivative Plaintiffs' argument, the Fund argues that its Complaint has "only one plaintiff" and that "to find that the 100-person requirement is met merely because a private or public corporation has more than 100 shareholders would ignore well-settled corporate law that the corporation is a distinct legal entity separate from its shareholders." Memorandum in Support of Remand in *Sentry* at 6 ("*Sentry* Memo"). This argument misses the point. The issue here is not whether the corporate veil should be pierced, but only whether under the language and intent of CAFA the action qualifies as a mass action in that it is brought to obtain a recovery for 100 or more persons. That clearly is the case here. Sentry is a defunct fund consisting of a collection of over 700 investor accounts. Declaration of Michael Thorne, June 19, 2009, ¶2 (filed with FGA's Notice of Removal in *Sentry*). The claims brought by Sentry here are for losses suffered by those investors holding those accounts, just as the class claims seek to recover the same losses suffered by those same investors (*i.e.,* the Shareholder Class Plaintiffs). Accordingly, the class claims and the *Sentry* claims should be treated the same for jurisdictional purposes under CAFA. Indeed, the explicit intent of CAFA is to disallow plaintiffs to avoid federal jurisdiction where recovery for a group of 100 or more injured plaintiffs is sought, regardless of whether plaintiffs proceed as a class action or in some other form. *Sentry* falls squarely within the kind of case that qualifies as a mass action eligible for removal to federal court under CAFA. *See, e.g., La. ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 428, 430 (5th Cir. 2008) (holding that a *parens patriae* antitrust action by the Attorney General for the benefit of individual insurance policyholders, in which the AG was "only a nominal party" and the individual insurance policyholders were the "real parties in interest," was removable under CAFA because the action "is being brought in a representative capacity on behalf of those who allegedly suffered harm.")

Significantly, the Fund has not cited any authority holding that the "mass action" provisions of CAFA do not apply to an action brought by an investment fund for the benefit of its one hundred or more shareholders, and we are aware of none.[10]

2. Moving Plaintiffs Have Not And Cannot Establish A CAFA Exception

Moving Plaintiffs, as the parties seeking remand, bear the burden to establish that one of CAFA's express exceptions applies.[11] *Brook v. UnitedHealth Group Inc.*, No. 06 CV 12954 (GBD), 2007 WL 2827808, at *3 (S.D.N.Y. Sept. 27, 2007) ("[W]here a statutory basis for exercising federal jurisdiction has been shown, the party opposing the exercise of the Court's established jurisdiction bears the burden of demonstrating that a CAFA exception exists."); *New Jersey Carpenters Vacation Fund*, 581 F. Supp. 2d at 588 ("Because . . . Defendants have shown that the case meets CAFA's removal requirements, the burden shifts to the Plaintiffs to show whether a CAFA exception applies."); *Puglisi*, 2009 WL 1515071, at *1 (holding that where the initial requirements for CAFA removal are met, the burden is on plaintiff to establish that one of the exceptions to CAFA is applicable).[12]

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[10] The Fund erroneously cites *Palm Harbor Homes, Inc. v. Walters*, No. 08 cv 196, 2009 WL 562854, *2 (M.D. Ala. Mar. 5 2009), for the proposition that an action "filed by a single corporate plaintiff" cannot be removed under CAFA. *Sentry* Memo at 6. Unlike here, plaintiffs in *Palm Harbor* did not assert that the action was a "mass action." Instead, they claimed that the lawsuit (a declaratory judgment) was removable under CAFA because it was "related to an arbitration between the parties wherein class allegations have been made." *Palm Harbor Homes, Inc.*, 2009 WL 562854, at *2. Equally inapposite is *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009). There, the court held that the mass action provisions of CAFA did not apply to a series of actions (each of which asserted claims of fewer than 100 plaintiffs) because those actions were "joined upon motion of a defendant," and 28 U.S.C. § 1332(d)(11)(B)(ii)(II) precluded such claims from removal as a mass action. That provision does not come into play here.

[11] Moreover, as a court in this district has noted, any such exceptions must be narrowly construed. *See New Jersey Carpenters Vacation Fund*, 581 F. Supp. 2d at 584-85 ("Congressional sponsors of [CAFA] repeatedly emphasized the breadth of CAFA, while insisting that each exception must be construed narrowly[.]").

Moving Plaintiffs argue that two exceptions apply: (1) the $75,000 jurisdictional amount exception; and (2) the internal affairs exception. Moving Plaintiffs fail to meet their burden on both exceptions.

(a) The "Amount In Controversy" Requirement And Other Jurisdictional Amount Requirements Under CAFA Are Met

Plaintiffs do not dispute, and by their silence, concede, that the "amount in controversy" requirement of $5 million in the aggregate – a threshold CAFA requirement (*see* 28 U.S.C. § 1332(d)(2),(6)) – is met. Instead, Derivative Plaintiffs erroneously contend that because *Pierce*, *Ferber*, and *Morning Mist* are derivative actions, "no plaintiff – much less 100 persons – could satisfy the $75,000 jurisdictional amount required under 28 U.S.C. § 1332(a)." *Pierce* Memo at 7; *Ferber* Memo at 6; *Morning Mist* Memo at 7.

First, Derivative Plaintiffs' statement is speculation, not fact, and deserves no weight at all. Second, the $75,000 threshold is irrelevant for federal jurisdiction purposes because CAFA expressly expands the district court's removal jurisdiction to include actions where the aggregate amount in controversy exceeds $5 million (*see* 28 U.S.C. § 1332(d)(2),(6)). FGA has established

[12] Moving Plaintiffs argue that the Second Circuit has not yet ruled on the issue. However, district courts in the Southern District of New York have unanimously and persuasively concluded that the burden to prove that an exception to CAFA applies rests with the plaintiff. As the court in *Brook* explained, "[i]t is a well established rule that the party seeking remand bears the burden of proving the applicability of an exception with regard to the general removal statute. . . . Since the structure of CAFA is comparable to the general removal statute, it should be interpreted consistently therewith. . . . Moreover, shifting the burden of proving an exception to the party seeking remand once the opposing party has established his right to a federal forum is consistent with CAFA's legislative intent to ensure that class actions of interstate or national implications be litigated in federal courts." *Brook*, 2007 WL 2827808, at *3. This view is in accord with decisions of the Fifth, Seventh, Ninth, and Eleventh Circuits. *See Preston v. Tenet Healthsystem Mem'l Med. Ctr.*, 485 F.3d 804, 813 (5th Cir. 2007); *Hart v. FedEx Ground Package Sys. Inc.*, 457 F.3d 675, 680 (7th Cir. 2006); *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1024 (9th Cir. 2007); *Evans v. Walter Indus., Inc.*, 449 F.3d 1159, 1164 (11th Cir. 2006); *Frazier v. Pioneer Americas LLC*, 455 F.3d 542, 546 (5th Cir. 2006). *See also Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003).

to a "reasonable probability" that each Action involves an aggregate amount in controversy greater than $5 million and claims of more than 100 plaintiffs are proposed to be tried together and therefore the Actions may be removed as mass actions. The claims of any individual plaintiffs with potential damages of less than $75,000 could, if the Court so determines, then be subject to remand for want of subject matter jurisdiction. This is consistent with the legislative intent of CAFA, as the Committee Report indicates:

> Subsequent remands of individual claims not meeting the Section 1332 jurisdictional amount requirement may take the action below the 100-plaintiff jurisdictional threshold or the $5 million aggregated jurisdictional amount requirement.... [But,] so long as the mass action met the various jurisdictional requirements at the time of removal, it is the Committee's view that those subsequent remands should not extinguish federal diversity jurisdiction over the action.

S. Rep. 109-14, at 47 (2005), *as reprinted in* 2005 U.S.C.C.A.N at 44.

Indeed, courts interpreting 28 U.S.C. § 1332(d)(11)(B)(i) have noted that jurisdiction over an entire action exists if *at least one* plaintiff meets the $75,000 jurisdictional amount required under 28 U.S.C. § 1332(a). *Lowery v. Ala. Power Co.*, 483 F.3d 1184 (11th Cir. 2008) ("[I]t seems clear that the $75,000 provision was not intended to bar district courts from asserting jurisdiction over the entire case if each individual plaintiff's claims do not exceed $75,000."); *Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 686 (9th Cir. 2006) ("[The Committee Report's] clarification [regarding the $75,000 requirement] is consistent with a logical reading of the statue."). It is both wrong and disingenuous for Derivative Plaintiffs to argue that simply because their claims are styled as derivative actions, *no plaintiff* could meet the $75,000 jurisdictional amount required under 28 U.S.C. § 1332(a).

It is also misleading for the *Ferber* Plaintiff to argue that "the Complaint does not describe [the over $9.5 million in fees paid] as damages suffered by plaintiffs." *Ferber* Memo at 6. In fact, the *Ferber* Complaint seeks, in addition to costs and other relief:

- "restitution of the monies paid to the Fund Defendants based on artificially inflated capital accounts of the Limited Partners";
- "ordering that PwC Canada and PwC Netherlands return any fees which it was paid by the Fund for alleged auditing services";
- "the imposition of a constructive trust over the monies received by FGG Bermuda, FGG Limited and/or each of the other Fund Defendants as Management Fees and/or Incentive Allocations calculated based on the artificially inflated capital accounts of the Limited Partners"; and
- "compensatory damages...individually and severally in an amount to be determined at trial".

Moreover, the requested relief is sought "in Plaintiff's favor." Based on the amounts listed on the face of the complaints – $9.5 million in fees paid and $9 million in allegedly mismanaged funds – and the fact that the *Ferber* Plaintiff seeks the return of all fees as well as "compensatory damages" as the result of defendants' alleged mismanagement of the funds, a "reasonable probability" that all jurisdictional requirements are met unquestionably has been established. And in any event, plaintiffs have not even attempted to meet their factual burden of showing that every injured party's claim is less than $75,000.

(b) The Internal Affairs Exception Does Not Apply

Moving Plaintiffs also argue that remand is appropriate here because the "internal affairs exception" applies. *Pierce* Memo at 8-9; *Ferber* Memo at 7-8; *Morning Mist* Memo at 7-8; *Sentry* Memo at 8. Moving Plaintiffs fail to establish that this exception applies.

Under the internal affairs doctrine, a federal court shall not have jurisdiction over any class or mass action that "solely involves a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized..." 28 U.S.C. § 1332(d)(2). The Senate Judiciary Committee Report on CAFA indicates that the internal affairs exception is directed at this doctrine, which involves "matters peculiar to the relationships among or between the corporation and its current officers, directors and shareholders." S. Rep. No. 109-14, at 45, *as reprinted in* 2005 U.S.C.C.A.N. 3, 43 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982). The doctrine essentially "is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs... because otherwise a corporation could be faced with conflicting demands." *Id.* at 645.

The internal affairs exception does not apply to any of the Actions because each of the Complaints include allegations of improper marketing and promotion of the Fairfield Greenwich funds that concern how the company represented itself to the public. As such, they do not solely concern the internal affairs or corporate governance of the funds. *Puglisi,* 2009 WL 1515071, at *3 (After reviewing the allegations contained in plaintiff's complaint, the court concluded that plaintiff had not met this burden based, in part, on the claim that defendants had "assured investors of the minimal risk to their investment . . . [in] marketing materials...").

The exclusion of these Actions from the CAFA internal affairs exception also is mandated by the Congressional intent of that exception. Congress enacted the CAFA internal affairs exception in order "to avoid disturbing in any way the federal versus state court jurisdictional lines already drawn in the securities litigation class action context by the enactment of [SLUSA]." *In re Textainer P'ship Sec. Litig.*, 2005 WL 1791559, at *4 (quoting S. Rep. No. 109-14, at 45 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 43). The jurisdictional lines drawn by SLUSA include the so-called "Delaware carve-out," which provides that states retain jurisdiction over covered class actions "based upon the statutory or common law of the State in which the issuer is incorporated." 15 U.S.C. § 77p(d). The purpose of the Delaware carve-out was to preserve the expertise and efficiency of Delaware courts over mergers, acquisitions, and other extraordinary transactions. *See, e.g.*, Cong. Record (extension of remarks), July 22, 1998, p. E1391 (comments of Rep. Anna G. Eshoo); Jennifer O'Hare, Director Communications and the Uneasy Relationship Between the Fiduciary Duty of Disclosure and the Anti-Fraud Provisions of the Federal Securities Laws, 70 U. CINN. L. REV. 475, 501-04 (2002). CAFA's internal affairs exception rests on a similar premise: that state courts' expertise over matters of a corporation's internal affairs or governance that arise under or by virtue of the laws of the state of incorporation or organization should be preserved. That premise, however, is irrelevant here, where New York state law issues do not arise and no state court expertise is applicable.

With respect to Derivative Plaintiffs' claims in particular, the internal affairs exception also does not apply because the complaints heavily implicate the conduct of external third parties. "Different conflicts principles apply, [...], where the rights of third parties external to the corporation are at issue." *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983). A substantial portion of Derivative Plaintiffs' Complaints – in each case over 12 pages – concerns the role of PricewaterhouseCoopers ("PwC") as auditor to the fund. *Ferber* Compl. at 35-49; *Pierce* Compl. at 35-49; *Morning Mist* Compl. at 49-69. PwC's role clearly falls outside the "internal affairs doctrine" because PwC is not a limited partner, general partner, manager, or investment manager in any fund. As an outside party, PwC's role with respect to any of the funds is by definition outside those funds' internal affairs. *See, e.g., In re Am. Int'l Group, Inc.*, 965 A.2d 763 (Del. Ch. 2009). Moreover, Derivative Plaintiffs' breach of contract claims against PwC (*Pierce* Compl. at ¶¶ 189-195; *Ferber* Compl. at ¶¶ 189-195; *Morning Mist* Compl. at ¶¶ 292-300) do not "arise under or by virtue of the laws of the State in which [the Fund] is organized." 28 U.S.C. § 1332(d)(2).

Derivative Plaintiffs' reliance on *In re Textainer P'ship Sec. Litig.*, 2005 WL 1791559 is misplaced. In *Textainer*, in contrast to the Actions here, plaintiff limited partners sued derivatively *only* the partnerships and their general partners for breach of fiduciary duties. The court held that the internal affairs exception applied because, *inter alia*, no claims were made against any third parties, such as the partnerships' auditors. *Id.*

.With respect to *Sentry*, the Fund argues that its complaint should be remanded to State court because "the Company's claims implicate its internal affairs and the duties that the Fairfield Defendants owed to the Company." *Sentry* Memo at 8. However, the internal affairs exception only applies to a claim "that arises under or by virtue of the laws of *the State in which such corporation or business enterprise is incorporated or organized…*" (emphasis added) 28 U.S.C. § 1332(d)(9)(b). The Fund is not incorporated or organized under any U.S. State. Instead, as the Fund acknowledges, it is "a company duly incorporated on October 30, 1990 under the International Business Companies Act of the British Virgin Islands, automatically re-registered on January 1, 2007 as a business company under the BVI Business Companies Act of 2004 of the British Virgin Islands, and recognized as a professional fund under the 1996 Mutual Funds Act of the British Virgin Islands." *Sentry* Complaint ¶ 12. Moreover, the Fund's "principal place of business is in the British Virgin Islands." *Id.* Thus, for this reason as well, the internal affairs exception cannot apply to the *Sentry* Complaint.

CONCLUSION

For the foregoing reasons, Moving Plaintiffs' request to remand *Ferber*, *Pierce*, *Morning Mist*, and *Sentry* to State court should be denied.

Dated: July 27, 2009
New York, New York

SIMPSON THACHER & BARTLETT LLP

By: ______________________

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EXHIBIT A

Case	Date Complaint Removed	Date Consolidated with *Anwar*	Date Motion to Remand Filed
Ferber v. Fairfield Greenwich Group et al. (filed February 13, 2009)	March 13, 2009, as amended on March 19, 2009	March 24, 2009	April 14, 2009
Pierce et al. v. Fairfield Greenwich Group et al. (filed February 17, 2009)	March 19, 2009	March 31, 2009	April 8, 2009
Morning Mist Holdings Limited et al. v. Fairfield Greenwich Group et al. (filed May 15, 2009)	May 29, 2009	June 9, 2009	June 8, 2009
Fairfield Sentry Limited v. Fairfield Greenwich Group et al. (filed May 29, 2009)	June 19, 2009	June 25, 2009	July 10, 2009

EXHIBIT B

The eleven consolidated cases are:

1. *Anwar, et al. v. Fairfield Greenwich Group, et al.* (09 CV 0118) ("*Anwar*")
2. *Zohar, et al. v. Fairfield Greenwich Group, et al.* (09 CV 4031)
3. *Laor, et al. v. Fairfield Greenwich Group, et al.* (09 CV 2222)
4. *The Knight Services Holdings Limited, et al. v. Fairfield Sentry Limited et al.* (09 CV 2269)
5. *Inter-American Trust, et al. v. Fairfield Greenwich Group, et al.* (09 CV 0301)
6. *Pacific West Health Medical Center Inc. Employees Retirement Trust, et al. v. Fairfield Greenwich Group, et al.* (09 CV 0134)
7. *Fairfield Sentry Limited vs. Fairfield Greenwich Group, et al.* (09 CV 5650) ("*Sentry*")
8. *Ferber v. Fairfield Greenwich Group, et. al.* (09 CV 2366)
9. *Pierce, et al. v. Fairfield Greenwich Group et al.* (09 CV 2588)
10. *Morning Mist Holdings Limited, et al. v. Fairfield Greenwich Group, et al.* (09 CV 5012)
11. *Bhatia, et al. v. Standard Chartered International (USA) Ltd., et al.* (09 CV 2410)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants. This Document Relates To: 09-CV-2366 (VM) (*Ferber* Action) 09-CV-2588 (VM) (*Pierce* Action) 09-CV-5012 (VM) (*Morning Mist* Action) 09-CV-5650 (VM) (*Sentry* Action)	MASTER FILE NO. 09-CV-0118 (VM)

DECLARATION OF PAUL J. SIRKIS

I, Paul J. Sirkis, make this declaration pursuant to 28 USC § 1746. I hereby state as follows:

1. I am an attorney associated with the law firm of Simpson Thacher & Bartlett LLP, counsel for certain Defendants in the above-captioned action. I submit this declaration in support of FGA's opposition to the motions to remand by the *Ferber*, *Pierce*, *Morning Mist* and *Sentry* Plaintiffs in the above-captioned consolidated action. I am fully familiar with the matters stated herein based on personal knowledge or review of files in the possession of my firm.

2. Based on copies of the subscription agreements in my possession ("Subscription Agreements") entered into by investors in Greenwich Sentry Partners, LP ("GSP"), the following are current limited partners of GSP:

i. Accucom Consulting Inc. Profit Sharing Plan

ii. Allard Investors LP

iii. Arque Constellation Fund, LP

iv. Artemis Financial Services LLC

v. Artemis Financial Services LLC Pension Fund

vi. Capital Management Partners

vii. Core Equity Trust

viii. Dawson Bypass Trust

ix. Edward Demetriou

x. Frank E. Pierce, III

xi. Frank E. Pierce, III, IRA

xii. Gail Plautz, John Plautz and Alberta Plautz as joint tenants

xiii. Gil Bossidan

xiv. Goldberger & Dubin Retirement Trust

xv. Joyce Rubin and Barry Globerman as joint tenants

xvi. JODA Brokerage Associates, Inc. Pension

xvii. John R. Schaupp

xviii. Jose Luis Cabrera & Rosa Maria Cabeda

xix. Lisa G. Kaminir

xx. Marilyn Noel McAlister

xxi. Natalia Hatgis

xxii. Patricia L. Cook Revocable Trust

xxiii. Philip A. Annibali Declaration of Trust

xxiv. Ronald A. Thomann

xxv. Sara Varzan and Luis Aron

xxvi. Susan Jo McKeefry Insurance Trust

xxvii. Susan McKeefry

xxviii. Triumph Multi-Series Fund LP

xxix. Yoshiki Hidaka and Masano Hidaka

3. Based on the Subscription Agreements, the following are former limited partners of GSP:

   i. Premier Advisors Fund LLC

   ii. Juniper Street Absolute Return Trust

   iii. Matapeodia LP

   iv. Citco Global Custody NV Pictet Notzstucki

   v. Gillian Jolis Defined Benefit Plan

4. Pursuant to an order issued by Magistrate Judge Theodore H. Katz on May 13, 2009 (the "Order"), subpoenas were served on the following ten non-party limited partners in GSP:

   i. Accucom Consulting Inc., c/o John Narducci, Trustee, 250 Post Road East, Westport, CT 06880 ("Accucom Profit Sharing Plan").

   ii. Allard Investors LP, Robert S. Critchell, GP, 2770 Indian River Blvd., Vero Beach, FL 32960 ("Allard").

   iii. Arque Constellation Fund, LP, 27520 Hawthorne Blvd. Suite 290, Rolling Hills, CA 90274 ("Arque").

iv. Core Equity Trust, c/o Jack Mayberry, 108 Caledonia St., Sausalito, CA 94966 ("Core Equity Trust").

v. Dawson Bypass Trust, c/o Michael Wind, Trustee, Michael Wind, Trustee. 1350 Broadway, Suite 1615, NY, NY 10018 ("Dawson Bypass Trust").

vi. Joyce Rubin, 16819 Knightsbridge Lane, Delray Beach, FL 33484.

vii. Triumph Multi-Series Fund LP, c/o Calhoun Asset Management, 8770 West Bryn Mawr Avenue, Suite 1300, Chicago, IL 60631 ("Triumph").

viii. Yoshiki and Masano Hidaka, 6305 Blackwood Rd., Bethesda, MD 20817.

ix. Juniper Street Absolute Return Trust, c/o Ashbridge Investment Management LLC, One South Broad Street, 23rd Floor, Philadelphia, PA 19109.

x. Premier Advisors Fund LLC, 35 E. Wacker Drive, #1600, Chicago, IL 60601 ("Premier Advisors Fund").

5. The subpoenaed non-parties responded as follows (the "Subpoena Responses," copies of which are in my possession):

i. A response was received from Accucom Profit Sharing Plan on June 29, 2009, listing 12 individuals who are beneficiaries in Accucom Profit Sharing Plan, and indicating that these individuals are all domiciled in Connecticut.

ii. A response was received from Allard on June 4, 2009, listing 12 individuals as partners in Allard, and indicating that these individuals are domiciled in New York, Florida, Pennsylvania, Connecticut, and Arizona.

iii. A response was received from Core Equity Trust on July 17, 2009, stating that there are 10 beneficiaries in that Trust, and indicating that these beneficiaries are domiciled in California, North Carolina, and Florida.

iv. A response was received from Dawson Bypass Trust on June 29, 2009, stating that there are one beneficiary and two remaindermen in that Trust, and indicating that these individuals are domiciled in Oregon and California.

v. A response was received from Barry Globerman on June 23, 2009, stating that Joyce Rubin and Barry Globerman (both listed as domiciled in Florida) invested in GSP as joint tenants, and that JODA Brokerage Associates Pension Plan contains one sole member (also domiciled in Florida).

vi. A response was received from Triumph on June 25, 2009, listing 15 limited partners in Triumph, and indicating that these limited partners are domiciled in Illinois and Nebraska. A subsequent response was received July 20, 2009, indicating that one of the limited partners in Triumph is a trust with two beneficiaries, and another limited partner in Triumph is a partnership held by two partners.

vii. A response was received from Premier Advisors Fund on July 17, 2009, listing at least 54 persons who held an interest in that Fund (some of the named persons with an interest in Premier Advisors Fund are trusts and limited liability corporations themselves), and indicating that these persons are domiciled in California, Florida, Missouri, Washington, Connecticut, New York, Virginia, Illinois, Massachusetts, Arizona, Texas, Puerto Rico, Alabama, North Carolina, Oklahoma, and Ohio.

6. The following limited partners in GSP voluntarily provided documentation (copies of which are in my possession) indicating as follows:

i. There are 15 partners in Capital Management Partners.

ii. There are 4 beneficial owners of Susan Jo McKeefry Insurance Trust.

iii. There are 8 partners in Arque, domiciled in New York, Missouri, and California.

7. Below is a summary indicating the total number of individuals in GSP's current limited partners for whose benefit *Pierce* is brought.

Accucom Profit Sharing Plan	12
Allard	12
Arque	8
Artemis Financial Services LLC	1
Artemis Financial Services LLC Pension	1
Capital Management Partners	15
Core Equity Trust	10
Dawson Bypass Trust	3
Edward Demetriou	1
Frank E. Pierce, III	1
Frank E. Pierce, III, IRA	1
Gail Plautz, John Plautz and Alberta Plautz as joint tenants	3
Gil Bossidan	1
Goldberger & Dubin Retirement Trust	2
J. Rubin & B. Globerman	2
JODA Brokerage Associates, Inc. Pension	1
John R. Schaupp	1
Jose Luis Cabrera & Rosa Maria Cabeda	2
Lisa G. Kaminir	1
Marilyn Noel McAlister	1
Natalia Hatgis	1
Patricia L. Cook Revocable Trust	1
Philip A. Annibali Declaration of Trust	1
Ronald A. Thomann	1
Sara Varzan & Luis Aron	2
Susan Jo McKeefry Insurance Trust	4
Susan McKeefry	1
Triumph	19
Yoshiki and Masano Hidaka	2
TOTAL	**111**

8. Below is a summary indicating the total number of individuals in GSP's former limited partners for whose benefit *Pierce* is brought.

Premier Advisors Fund	54
Juniper Street Absolute Return Trust	1
Matapeodia LP	1
Citco Global Custody NV Pictet Notzstucki	1
Gillian Jolis Defined Benefit Plan	1
TOTAL	**58**

9. We have provided copies of the Subpoena Responses to counsel for the Derivative Plaintiffs pursuant to a confidentiality agreement.

10. In order to preserve the confidential and personal information of the investors in GSP, the Subscription Agreements and Subpoena Responses have not been attached to this Declaration. At the Court's request, these documents will be provided for in-camera review.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 27, 2009

Paul J. Sirkis

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants. This Document Relates To: 09-CV-2588 (VM) (*Pierce* Action)	MASTER FILE NO. 09-CV-0118 (VM)

SUPPLEMENTAL DECLARATION OF PAUL J. SIRKIS

I, Paul J. Sirkis, make this declaration pursuant to 28 USC § 1746. I hereby state as follows:

1. I am an attorney associated with the law firm of Simpson Thacher & Bartlett LLP, counsel for certain Defendants in the above-captioned action. I submit this Supplemental Declaration and exhibits hereto, in support of FGA's opposition to the motions to remand by the *Ferber*, *Pierce*, *Morning Mist* and *Sentry* Plaintiffs in the above-captioned consolidated action. I am fully familiar with the matters stated herein based on personal knowledge or review of files in the possession of my firm.

2. Attached are true and correct redacted copies of subscription agreements ("Subscription Agreements") of the following limited partners in Greenwich Sentry Partners, LP ("GSP"):

   i. Attached hereto as Exhibit 1 is a true and correct redacted copy of the Subscription Agreement of Accucom Consulting Inc. Profit Sharing Plan.

   ii. Attached hereto as Exhibit 2 is a true and correct redacted copy of the Subscription Agreement of Allard Investors LP.

iii. Attached hereto as Exhibit 3 is a true and correct redacted copy of the Subscription Agreement of Arque Constellation Fund, LP.

iv. Attached hereto as Exhibit 4 is a true and correct redacted copy of the Subscription Agreement of Artemis Financial Services LLC.

v. Attached hereto as Exhibit 5 is a true and correct redacted copy of the Subscription Agreement of Artemis Financial Services LLC Pension Fund.

vi. Attached hereto as Exhibit 6 is a true and correct redacted copy of the Subscription Agreement of Capital Management Partners.

vii. Attached hereto as Exhibit 7 is a true and correct redacted copy of the Subscription Agreement of Core Equity Trust.

viii. Attached hereto as Exhibit 8 is a true and correct redacted copy of the Subscription Agreement of Dawson Bypass Trust.

ix. Attached hereto as Exhibit 9 is a true and correct redacted copy of the Subscription Agreement of Edward Demetriou.

x. Attached hereto as Exhibit 10 is a true and correct redacted copy of the Subscription Agreement of Frank E. Pierce, III.

xi. Attached hereto as Exhibit 11 is a true and correct redacted copy of the Subscription Agreement of Frank E. Pierce, III, IRA.

xii. Attached hereto as Exhibit 12 is a true and correct redacted copy of the Subscription Agreement of Gail Plautz, John Plautz and Alberta Plautz as joint tenants.

xiii. Attached hereto as Exhibit 13 is a true and correct redacted copy of the Subscription Agreement of Gil Bossidan.

xiv. Attached hereto as Exhibit 14 is a true and correct redacted copy of the Subscription Agreement of Goldberger & Dubin Retirement Trust.

xv. Attached hereto as Exhibit 15 is a true and correct redacted copy of the Subscription Agreement of Joyce Rubin and Barry Globerman as joint tenants.

xvi. Attached hereto as Exhibit 16 is a true and correct redacted copy of the Subscription Agreement of JODA Brokerage Associates, Inc. Pension.

xvii. Attached hereto as Exhibit 17 is a true and correct redacted copy of the Subscription Agreement of John R. Schaupp.

xviii. Attached hereto as Exhibit 18 is a true and correct redacted copy of the Subscription Agreement of Jose Luis Cabrera & Rosa Maria Cabeda.

xix. Attached hereto as Exhibit 19 is a true and correct redacted copy of the Subscription Agreement of Lisa G. Kaminir.

xx. Attached hereto as Exhibit 20 is a true and correct redacted copy of the Subscription Agreement of Marilyn Noel McAlister.

xxi. Attached hereto as Exhibit 21 is a true and correct redacted copy of the Subscription Agreement of Natalia Hatgis.

xxii. Attached hereto as Exhibit 22 is a true and correct redacted copy of the Subscription Agreement of Patricia L. Cook Revocable Trust.

xxiii. Attached hereto as Exhibit 23 is a true and correct redacted copy of the Subscription Agreement of Philip A. Annibali Declaration of Trust.

xxiv. Attached hereto as Exhibit 24 is a true and correct redacted copy of the Subscription Agreement of Ronald A. Thomann.

xxv. Attached hereto as Exhibit 25 is a true and correct redacted copy of the Subscription Agreement of Sara Varzan and Luis Aron.

xxvi. Attached hereto as Exhibit 26 is a true and correct redacted copy of the Subscription Agreement of Susan Jo McKeefry Insurance Trust.

xxvii. Attached hereto as Exhibit 27 is a true and correct redacted copy of the Subscription Agreement of Susan McKeefry.

xxviii. Attached hereto as Exhibit 28 is a true and correct redacted copy of the Subscription Agreement of Triumph Multi-Series Fund LP.

xxix. Attached hereto as Exhibit 29 is a true and correct redacted copy of the Subscription Agreement of Yoshiki Hidaka and Masano Hidaka.

xxx. Attached hereto as Exhibit 30 is a true and correct redacted copy of the Subscription Agreement of Premier Advisors Fund LLC.

xxxi. Attached hereto as Exhibit 31 is a true and correct redacted copy of the Subscription Agreement of Juniper Street Absolute Return Trust.

xxxii. Attached hereto as Exhibit 32 is a true and correct redacted copy of the Subscription Agreement of Matapedia LP.

xxxiii. Attached hereto as Exhibit 33 is a true and correct redacted copy of the Subscription Agreement of Citco Global Custody NV Pictet Notzstucki.

xxxiv. Attached hereto as Exhibit 34 is a true and correct redacted copy of the Subscription Agreement of Gillian Jolis Defined Benefit Plan.

3. Pursuant to an order issued by Magistrate Judge Theodore H. Katz on May 13, 2009 (the "Order"), subpoenas were served on 9 non-party limited partners in GSP (the "Subpoenas"), including on Triumph Multi-Series Fund LP, c/o Calhoun Asset Management, 8770 West Bryn Mawr Avenue, Suite 1300, Chicago, IL 60631 ("Triumph"). Attached hereto as Exhibit 35 is a true and correct copy of a Subpoena response received from Calhoun Asset Management, the General Partner of Triumph, on August 4, 2009, indicating that one of the limited partners in Triumph is a trust with four beneficiaries, and another limited partner in Triumph is a partnership held by two partners.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 17, 2009

Paul J. Sirkis

REDACTED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, et al. v. FAIRFIELD GREENWICH LIMITED, et al.	Master File No. 09 CV 0118 (VM) 09 CV 5012 (VM) (Morning Mist Action) 09 CV 2366 (VM) (Ferber Action) 09 CV 2588 (VM) (Pierce Action)

DERIVATIVE PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTIONS TO REMAND

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INTRODUCTION

The Court should reject defendant FGA's efforts to transmogrify these derivative cases into "mass actions" under CAFA. FGA argues that jurisdiction here would promote a policy of placing important cases in federal court. In truth, FGA's unprecedented approach would destroy state court jurisdiction over virtually every mid-sized or large case filed by a public company.

Almost all public companies have 100 shareholders (or beneficial owners of shareholders) who could benefit, albeit indirectly, from a company's lawsuit; thus, under FGA's theory, every $5 million contract claim filed by a public company would be a "mass action" removable to federal court. The breadth and impact of FGA's proposed rule are mind-numbing.

Congress, of course, never imagined that CAFA would so open the floodgates of the federal courts -- or slam shut the doors of the state courts. So "drastic a change to federal jurisdiction"[1] was never contemplated by Congress. Fortunately, this radical shift in state court/federal court jurisdiction urged by FGA is not remotely possible under CAFA.

Stripped of its hyperbole, FGA's argument boils down to just two points: (1) a derivative case on behalf of an entity that has 100 investors (or 100 beneficial owners of fewer investors) is a "mass action," and (2) these derivative actions don't relate to internal affairs. The cases must be remanded if FGA is wrong on either point. As shown below, FGA is wrong on both.

ARGUMENT

A. FGA Misstates the Burden of Proof

The Second Circuit squarely places the burden of establishing CAFA jurisdiction on the removing defendant. *Blockbuster*, 472 F.3d at 58; *see also* Dkt. 117 (09 CV 0118), Memorandum Opinion and Order dated May 1, 2009 ("May Order"), at 6 (Katz, M.J.) (citing

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[1] *Cf. Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) (addressing burden of proof).

Blockbuster). The standard here is proof to a "reasonable probability." *Blockbuster*, 472 F.3d at 58. Disturbingly, FGA denies its burden here.[2] And, its burden cannot be met.

B. FGA Has Not Satisfied the 100-Person Requirement

1. There is Just One Real Party in Interest

FGA cites no authority holding that a derivative action is a "mass action." For good reason. Each derivative case alleges claims on behalf of just one person -- a fund. *Sung v. Wasserstein*, 415 F. Supp. 2d 393, 408 (S.D.N.Y 2006) (Marrero, J.) (remanding derivative lawsuit removed under SLUSA, noting that case was "not a class action"). That there may be over 100 investors in two of the funds (Fairfield Sentry Ltd. and Greenwich Sentry, LP) is beside the point. To qualify as a "mass action," a case must involve "monetary relief claims of 100 or more persons [that] are proposed to be tried jointly ...." 28 U.S.C. § 1332(d)(11)(B).[3] *See Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1188 n.7 (11th Cir. 2007) (cited in Opp. at 14) ("mass action" is action "brought by 100 or more persons"). Here, the monetary relief claims in each case are for just one person -- the fund.[4]

FGA concedes that, for purposes of counting, CAFA looks only at the "real parties in interest." Opp. at 11-12, quoting *La. ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 428, 430 (5th Cir. 2008). But in each derivative action, the only real party in interest is the fund, and plaintiffs seek to vindicate the claims of the fund, "somewhat as a 'next friend' may do for an individual ...." *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522-23 (1947); *see* *Davenport v. Dows*, 85 U.S. 626, 627 (1873) ("The relief asked is on behalf of the corporation, not the individual shareholder, and if it be granted the complainant derives only an incidental benefit from it.").[5]

---

[2] Ignoring controlling law, FGA states that "[p]laintiffs cannot prove, *as they must*, that [CAFA's] requirements are not met ...." Opposition Brief ("Opp.") at 2 (emphasis supplied).

[3] Subsequent references to CAFA, as codified, omit "28 U.S.C.".

[4] That plaintiffs, *qua* current investors, may benefit from the litigation (albeit indirectly), *see* Opp. at 9, does not suffice to create a mass action. It merely shows that plaintiffs have *standing* to bring derivative actions on behalf of the funds. *See* N.Y. Bus. Corp. Law § 626(b).

The line of cases establishing that the entity -- and not the plaintiff -- is the real party in interest in a derivative action is unbroken. Congress could have changed that rule for CAFA and counted the entity's investors towards the 100-person requirement in derivative cases, but did not do so. Thus, with just one "real party in interest" in each derivative case, FGA fails the CAFA count test by 99.

2. CAFA's Legislative History Undermines FGA's Argument

Suggesting statutory ambiguity, FGA cherry picks from legislative history, especially Senate Report 109-14 ("Report").[6] FGA then improperly seeks to "enshrine the Committee Report as law." *Blockbuster*, 472 F.3d at 58. The Report, however, confirms that Congress merely sought to provide a "narrowly-tailored expansion of federal diversity jurisdiction," *see* Report at 27, and explains that, for a "mass action," there must be 100 "named plaintiffs." *Id.* at 46. CAFA thus "leaves in state court" "class actions with fewer than 100 plaintiffs." *Id.* at 27.

Statements of legislators are in accord. As Representative Jim Sensenbrenner explained:

[5] *See also Ross v. Bernhard*, 396 U.S. at 538; *Joy v. North*, 692 F.2d 880, 887 (2d Cir. 1982); *Mottolese v. Kaufman*, 176 F.2d 301, 302 (2d Cir. 1949) ("The real plaintiff in interest ... is not the shareholder, but, as in all shareholders' derivative suits, the [company]"); *Bankston v. Burch*, 27 F.3d 164, 167 (5th Cir. 1994) ("the partnership is ... the real party in interest in a derivative lawsuit").

[6] *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in '"looking over a crowd and picking out your friends."'") (quoting Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983)).

> Under subsection 1332(d)(11), any civil action in which *100 or more named parties* seek to try their claims for monetary relief together will be treated as a class action for jurisdictional purposes. *The Sponsors wish to stress that a complaint in which 100 or more plaintiffs are named* fits the criteria of seeking to try their claims together, because there would be no other apparent reason to include all of those claimants in a single action unless the intent was to secure a joint trial of the claims asserted in the action.

151 Cong. Rec. H723, H729 (daily ed. Feb. 17, 2005) (emphasis added). *See also* 151 Cong. Rec. S1076, S1082 (daily ed. Feb. 8, 2005) (statement of Sen. Lott).

The legislative history further reveals that the 100 or more "named" plaintiffs must be seeking to try "their claims" for monetary relief. Report at 46 ("100 or more named parties [must] seek to try *their claims* for monetary relief together") (emphasis supplied); *id.* at 47 ("mass actions" involve "a lot of people who want *their claims* adjudicated together") (emphasis supplied); *see also* statements of Rep. Sensenbrenner and Sen. Lott (cited above). Here, of course, none of the derivative cases has more than two named plaintiffs; moreover, the cases do not seek to vindicate "their" claims, only those of the real parties in interest -- the funds.[7]

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[7] FGA's public policy arguments add nothing to the mix. Although CAFA "creat[ed] another basis to remove 'securities cases that have national impact' from state courts," Opp. at 5 (quoting *Estate of Pew v. Cardarelli*, 527 F.3d 25, 26 (2d Cir. 2006)), the derivative cases are not securities cases. Moreover, a key concern underlying CAFA was that certain state court judges were too "lax" in applying the "strict requirements" of class certification. Report at 14. But in these derivative cases, no class certification is sought.

Nothing about these derivative actions "resemble" class actions. Opp. at 6. Indeed, the distinction between derivative and class actions is so well recognized that courts routinely prohibit class counsel from asserting derivative claims. *See, e.g., St. Clair Shores Gen. Employees Ret. Sys. v. Eibeler*, No. 06 CV 688, 2006 U.S. Dist. LEXIS 72316, at *23 (S.D.N.Y. Oct. 4, 2006) ("Courts in this Circuit have long found that plaintiffs attempting to advance derivative and direct claims in the same action face an impermissible conflict of interest."); *Brickman v. Tyco Toys, Inc.*, 731 F. Supp. 101, 109 (S.D.N.Y. 1990) (denying class certification motion: plaintiff "cannot maintain that suit and his derivative action simultaneously").

3. FGA's Discovery in *Pierce* is Inadmissible and Non-Probative

FGA's argument in the *Pierce* case is misguided. Conceding there are just 29 current investors in the Greenwich Sentry Partners, LP fund ("GSP"), FGA claims there are 111 beneficial owners of the current investors in FGA.[8] But a beneficial owner of a person who, in turn, is an investor in a fund is not even a "next friend" of the real party in interest, *see Koster*, 330 U.S. at 522-23; it's a distant relative. As shown above, the number of investors in the fund is irrelevant for purposes of CAFA jurisdiction in a derivative action. FGA's suggestion that the Court should jump through another hoop and count the number of beneficial owners of the persons who in turn invested in the fund, is nonsensical.[9]

Also, CAFA makes no mention of "beneficial owners." If Congress wanted them to count for the 100-person test, it would have said so. *Compare with* 15 U.S.C. § 80a-3(c)(7)(B)(i) (exempting from definition of "investment company" an issuer whose securities "are beneficially owned by not more than 100 persons"); 15 U.S.C. § 78p(a)(1) (requiring disclosure by person who is "directly or indirectly the beneficial owner" of certain securities).

Not only is FGA's legal argument specious, its factual analysis suffers from the same defect that plagued Michael Thorne's declaration. In granting FGA's application for jurisdictional discovery, the Court stated:

> [W]here jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to *evidence* outside the pleadings, such as *affidavits*.

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[8] Amended Declaration of Paul J. Sirkis, dated July 31, 2009 ("Am. Sirkis Decl."), ¶¶ 2, 12.

[9] Citing an absence of "controlling authority," FGA claims it removed the cases in good faith and thus should not have to pay costs and fees under 28 U.S.C. § 1447(c). Opp. at 9 n.8. But the test is whether removal was "objectively reasonable," *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005), not whether it is precluded by controlling authority. Here, removal was unreasonable.

May Order at 4 (emphasis supplied) (citation omitted). *See also* Letter of Mark Cunha, Esq. to Judge Katz, dated Apr. 16, 2009 ("Cunha Ltr."), at 3.

Virtually all of the materials submitted by FGA to satisfy the 100-person test (as wrongly construed by FGA) are letters or emails, and thus rank hearsay. Hearsay doesn't suffice. *Cunningham Charter Corp. v. Learjet, Inc.*, No. 07 CV 233, 2008 U.S. Dist. LEXIS 61709, at *12 n.3, 14-15 (S.D. Ill. Aug. 13, 2008) (CAFA case); *see generally Zhen Nan Lin v. U.S. Dep't of Justice*, 459 F.3d 255, 272 (2d Cir. 2006); *Wahad v. FBI*, 179 F.R.D. 429, 435 (S.D.N.Y. 1998) (striking portions of lawyer's affidavit "fraught with … inadmissible hearsay").

[redacted][10] [redacted]

[redacted]

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[10] As shown above, what matters here is that there is only *one* real party in interest (the fund); the number of the fund's limited partners (or those partners' beneficial owners) is irrelevant.

[11] [redacted]

[redacted]

FGA's count also includes people who died before the start of the lawsuit, further overstating the number of current beneficial owners. *See* 8/21/09 Aff. of Frank E. Pierce.

[redacted]

C. **Plaintiffs Do Not Seek "Monetary Relief"**

Because plaintiffs are suing derivatively on behalf of the funds, they are seeking equitable relief, not "monetary relief" as required by CAFA. § 1332(d)(11)(B)(i). *See Ross*, 396 U.S. at 538; *Koster*, 330 U.S. at 522. That fact defeats a "mass action."

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[12] Even assuming, contrary to the law, that the number of current beneficial owners of the limited partners of the fund were relevant, the number of former beneficial owners is not. *See* N.Y. Bus. Corp. Law § 626(b) (plaintiff in derivative action must have current ownership interest).

[13] [redacted]

D. CAFA's "Internal Affairs" Provision Precludes Jurisdiction

Jurisdiction also is precluded by CAFA's "internal affairs" provision, § 1332(d)(9)(B).[14] FGA does not dispute that the cases (at least principally) concern the funds' internal affairs or governance; nonetheless, FGA argues that the cases relate to "improper marketing and promotion." Opp. at 16 (citing *Puglisi v. Citigroup Alternatives Inv., LLC*, No. 08 CV 9774, 2009 WL 1515071 (S.D.N.Y. May 29, 2009)). The argument is without merit.

As derivative actions, these cases relate to the funds' "internal affairs or governance," and *Puglisi* does not suggest otherwise. *Puglisi* quotes at length allegations of improper marketing and promotion from the complaint in that case. *Id.* at *2-3. Here, FGA points to no comparable allegations in the derivative complaints. The *Puglisi* complaint also pled class action claims and asserted that class members "suffered damages" that they could have avoided by

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[14] Principally relying on *Brook v. UnitedHealth Group Inc.*, 2007 WL 2827808 (S.D.N.Y. Sept. 27, 2007), FGA says plaintiffs bear the burden to prove "exceptions" to CAFA jurisdiction. Opp. at 13 n.12. *Brook*, however, listed only three "exceptions": the so-called "local controversy," "home state controversy" and "interests of justice" exceptions. *See* 2007 WL 2827808, at *3 & nn.5-7. CAFA's "internal affairs" provision is not among those "exceptions." None of FGA's other cases (Opp. at 13 n.12) addressed the placement of the burden with respect to the "internal affairs" provision.

Moreover, the three exceptions described in *Brook* concerned scenarios in which a court may or shall "decline to exercise jurisdiction" under CAFA. *E.g., Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1023 (9th Cir. 2007) ("§§ 1332(d)(4)(A) and (B) *require* federal courts -- although they *have* jurisdiction under § 1332(d)(2) -- to '*decline to exercise jurisdiction*' when the criteria set forth in those provisions are met.") (emphasis in original) (cited in Opp. at 13 n.12). In contrast, the internal affairs provision, § 1332(d)(9)(B), provides that jurisdiction "shall not apply" in a case relating to internal affairs. *See generally Estate of Pew*, 527 F.3d at 30 & n.2 (actions relating to internal affairs are "excluded from CAFA's expanded jurisdiction"). Thus, in a case related to internal affairs, jurisdiction never even attaches in the first place. Accordingly, even if a plaintiff bears the burden to prove CAFA's "exceptions" under *Brook*, that burden does not extend to cases related to internal affairs.

"withdrawing their funds from the Fund."[15] Here, plaintiffs assert derivative claims and allege damages to the *funds*, thus placing the cases squarely within CAFA's "internal affairs" provision.

FGA's reliance on *In re American Int'l Group, Inc.*, 965 A.2d 763 (Del. Ch. 2009) (Opp. at 17), to contest application of the "internal affairs" provision, backfires. As that case noted, "PWC's role as an auditor *relates to the internal affairs of the corporation* ...." *Id.* at 817 (emphasis supplied). CAFA's "internal affairs" provision applies where the claim "relates to the internal affairs ... of a corporation," § 1332(d)(9)(B); thus it applies here.[16]

FGA also argues that the internal affairs provision seeks to preserve "the federal versus state court jurisdictional lines already drawn in the securities litigation class action context" by SLUSA. Opp. at 16 (citation omitted). SLUSA, however, does not provide for federal jurisdiction over derivative claims. *Sung*, 415 F. Supp. 2d at 408.

Finally, state court expertise on internal affairs matters (Opp. at 17) supports remand here. *See Matter of Topps Co. Inc. Shareholder Litig.*, 2007 N.Y. Slip Op 52543U, at *6, 19 Misc. 3d 1103A (Sup. Ct. N.Y. County 2007) (New York's Commercial Division is "a specialized commercial court that has been successfully handling complex commercial and corporate litigation since its inception in 1993.... This court is empowered to hear cases involving breach of fiduciary duty claims arising out of corporate restructuring, shareholder derivative actions, and disputes concerning the internal affairs of business organizations ...").

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[15] *See Puglisi* Complaint, ¶ 70 (Exh. A to Dkt. 1, 08 CV 9774 (S.D.N.Y.)).

[16] *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (Opp. at 17) is inapposite. That case did not involve CAFA, but rather the availability of a setoff to a claim by a foreign governmental instrumentality. *See id.* at 613.

E. FGA's Hypothesized Joinder Precludes a Mass Action

CAFA excludes from "mass actions" an action in which "the claims are joined upon motion of a defendant." § 1332(d)(11)(B)(ii)(II). Here, the would-be joinder of hypothesized claims of 100 persons (even assuming there were 100 real parties in interest) is a suggestion of defendant FGA, not the plaintiffs. That fact alone precludes a mass action. *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 954 (9th Cir. 2009).

CONCLUSION

The Derivative Plaintiffs' motions should be granted.

Dated: August 21, 2009

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, et al. v. FAIRFIELD GREENWICH LIMITED, et al.	Master File No. 09 CV 0118 (VM) 09 CV 2588 (VM) (Pierce Action)

AFFIDAVIT OF FRANK E. PIERCE III IN SUPPORT OF MOTION TO REMAND

STATE OF NEW YORK)
) ss.:
COUNTY OF COLUMBIA)

FRANK E. PIERCE, being duly sworn, deposes and says:

1. I am a named plaintiff in the *Pierce* action, 09 CV 2588. I submit this Affidavit, based upon personal knowledge, in support of the motion to remand the action to state court.

2. I understand that, in support of its opposition to the motion, Fairfield Greenwich Advisors, LLC has submitted the Amended Declaration of Paul J. Sirkis, dated July 31, 2009, listing (at ¶ 12), as a limited partner of Greenwich Sentry Partners, LP, "Gail Plautz, John Plautz and Alberta Plautz as joint tenants," which it has counted as three individuals.

3. Gail Plautz is my wife. Her parents, John Plautz and Alberta Plautz, passed away in 1997.

Frank E. Pierce III

Sworn to before me this
21st day of August 2009

Notary Public
ALLYSON P. WEBSTER - 01WE5032249
Notary Public, State of New York
Qualified in Columbia County
Commission Expires 8/22/2010

DOCS\483843v1

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants. This Document Relates To: 09-CV-2366 (VM) (*Ferber* Action) 09-CV-2588 (VM) (*Pierce* Action) 09-CV-5012 (VM) (*Morning Mist* Action)	MASTER FILE NO. 09-CV-0118 (VM)

DEFENDANT FGA'S SUR-REPLY IN FURTHER OPPOSITION TO DERIVATIVE PLAINTIFFS' MOTIONS TO REMAND

September 8, 2009

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PRELIMINARY STATEMENT

Defendant FGA files this sur-reply in further opposition to Derivative Plaintiffs' motions to remand principally to address a number of alleged factual issues raised by Derivative Plaintiffs.

First, contrary to Derivative Plaintiffs' suggestion, the number of current beneficial holders in Greenwich Sentry Partners ("GSP") remains over 100. As reflected in the Further Supplemental Declaration of Paul J. Sirkis filed herewith, the two investors whose subpoena responses did not clearly indicate the status of their beneficial holders have confirmed that all but two of them are *current investors*. Consequently, GSP has at least 109 current beneficial holders, exceeding the 100-person requirement under CAFA. Derivative Plaintiffs' contention that counting beneficial holders under CAFA would "destroy state court jurisdiction over virtually every mid-sized or large case filed by a public company" (Derivative Plaintiffs' Reply In Further Support Of Their Motions To Remand ("Reply") at 1) is without merit. CAFA clearly states that its mass action requirements are satisfied if the "monetary relief claims of 100 or more persons are proposed to be tried jointly." Here, Derivative Plaintiffs propose to try jointly the monetary relief claims of more than 100 investors in *private investment funds*, clearly satisfying the language of the statute. There is no reason why the result here would or should apply to corporate shareholders.

Second, Derivative Plaintiffs' argument that the number of current beneficial holders may not reach 100 because "many subscription agreements" require the general partner's consent to the creation of a beneficial interest is both irrelevant and based on a mischaracterization of the GSP subscription agreements.

Third, Derivative Plaintiffs still cannot establish that any CAFA exception, including the internal affairs exception, applies.[1]

Finally, Derivative Plaintiffs' argument that a claim for monetary relief is precluded by the derivative nature of their suits is contrary to settled law, including the very case they cite in support of their erroneous argument.

ARGUMENT

I. THE COURT-ORDERED DISCOVERY ESTABLISHES THAT THERE ARE OVER 100 CURRENT BENEFICIAL CLAIM HOLDERS IN *PIERCE*

Derivative Plaintiffs question whether the beneficial claim holders listed in the responses to FGA's subpoenas by Accucom Profit Sharing Plan ("Accucom") and Triumph Multi-Series Fund LP ("Triumph") are current. Reply at 6-7. As indicated in Exhibits 1 and 2 of the Further Supplemental Sirkis Declaration dated September 8, 2009, all of Triumph's beneficial holders and ten of Accucom's twelve beneficial holders are current. Taking this into account, FGA amends its count of current GSP beneficial holders from 111 to 109, which still exceeds the 100-person requirement under CAFA.

In an attempt to prevent the proper application of CAFA, Derivative Plaintiffs claim that the "real party in interest" in a derivative suit is the named plaintiff,[2] Reply at 2-3, and that Congressional intent is clear on this point because Congress "could have changed that rule for CAFA" but failed to do so. *Id.* Again, this misses the point. The question is not how many

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1 FGA does not "deny its burden of proof" as Derivative Plaintiffs argue. Reply at 1-2. FGA acknowledges that the burden to establish threshold CAFA requirements are on the removing party. However, the burden to prove *exceptions* falls on Plaintiffs.

2 In an attempt to further differentiate class and derivative claims, Derivative Plaintiffs erroneously argue that courts prohibit class counsel from asserting derivative claims. To the contrary, courts have permitted such representation. *See, e.g.*, *Berman v. HNC Mortgage & Realty Investors*, 27 Fed. R. Serv. 2d 370 (D. Conn. 1979).

"real parties in interest" exist in a derivative case,[3] but whether there are "monetary relief claims of 100 or more persons [that] are proposed to be tried jointly." 28 U.S.C. § 1332(d). Here, FGA has demonstrated that there are.

The recent case of *State of Oregon v. Oppenheimerfunds, Inc.*, No. 09-CV-6135, 2009 WL 2517086 (D. Or. Aug. 14, 2009), further supports FGA's position. Defendants in *Oppenheimerfunds* argued that removal under SLUSA was appropriate as a covered "class action" because it involved damages sought on behalf of thousands of trust beneficiaries. The court examined whether damages were in fact "sought on behalf of more than 50 persons or prospective class members" as required for SLUSA removal. The court noted that: "At first blush, the answer to the questions appears simple – the Oregon 529 College Savings Board seeks damages on behalf of the thousands of OCS plan participants alleging misrepresentations and omission of a material fact in connection with the purchase or sale of the Core Bond Fund..." However, only because SLUSA explicitly states that "a corporation, investment company, pension plan, partnership, or other entity, *shall be treated as one person or prospective class member*, but only if the entity is not established for the purpose of participating in the action," 15 U.S.C. § 78bb(f)(5)(D) (emphasis added), the court found that the Oregon 529 College Savings Board should be considered a single plaintiff. In stark contrast with SLUSA, CAFA does not have a similar counting provision. The fact that such a counting provision explicitly exists in SLUSA, coupled with no such provision in CAFA, a statute covering similar subject matter and

[3] The case law is also clear that limited partners have a significant stake in derivative litigation. *See, e.g., Indep. Investor Protective League et al. v. Time, Inc.*, 50 N.Y.2d 259, 263 (1980) ("Although in a theoretical sense a derivative action is brought for the benefit of the corporation, '[i]n a very real sense...the standing of the shareholder is based on the fact that...he is defending his own interests as well as those of the corporation.'"); *Tenney v. Rosenthal*, 6 N.Y.2d 204, 211 (1959) (same); *Sorin v. Shahmoon Indus., Inc.*, 220 N.Y.S.2d 760 (1961) (same).

passed in a similar time period, indicates that Congress did *not* intend for claimants to be counted the same way under CAFA as they are under SLUSA.

Derivative Plaintiffs also argue that the exhibits to the Amended Sirkis Declaration ("Am. Sirkis Decl.") include "letters and emails" that are inadmissible hearsay.[4] Reply at 6. Derivative Plaintiffs are wrong. The so-called "letters and emails" are responses to subpoenas, and as such are admissible under Federal Rule of Evidence 807. *See U.S. v. Am. Cyanamid Co.*, 427 F. Supp. 859 (S.D.N.Y. 1977); *U.S. v. Gwathney*, 465 F.3d 1133, 1141-42 (10th Cir. 2006). *See also U.S. v. Simmons*, 773 F.2d 1455, 1459 (4th Cir. 1985); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 608 (9th Cir. 1993); *Furtado v. Bishop*, 604 F.2d 80, 91–93 (1st Cir. 1979); *U.S. v. Iaconetti*, 540 F.2d 574, 578 (2d Cir. 1976); *U.S. v. Bachsian*, 4 F.3d 796, 799 (9th Cir. 1993).[5]

II. DERIVATIVE PLAINTIFFS MISCHARACTERIZE THE GSP SUBSCRIPTION AGREEMENTS

[redacted]

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[4] Notably, Derivative Plaintiffs do not challenge the authenticity of the documents attached to the Declaration nor the reliability of the information contained therein.

[5] Moreover, the Amended Sirkis Declaration also is "a vehicle placing before the Court relevant, admissible documents" and "the Court can "draw its own conclusions based on th[e] evidence, not based upon an attorney's characterizations of it." *New York v. Solvent Chemical Co., Inc.*, 218 F. Supp. 2d 319, 331 (W.D.N.Y. 2002); *Gasser v. Infanti Int'l, Inc.*, No. 03 Civ. 6413, 2008 WL 2876531, at *7 (E.D.N.Y. July 23, 2008).

[redacted]

III. THE INTERNAL AFFAIRS DOCTRINE IS A CAFA EXCEPTION AND DERIVATIVE PLAINTIFFS CANNOT ESTABLISH THAT IT APPLIES HERE

Derivative Plaintiffs confusingly cite a number of inapposite cases to support their argument that the internal affairs doctrine is somehow not an exception to CAFA and that therefore Defendants bear the burden of proof. Reply at 8, fn. 14. Their argument runs counter to controlling authority, which clearly holds that the internal affairs doctrine *is* an exception to CAFA jurisdiction, and that the burden of proof is therefore on the plaintiff. *See, e.g., Puglisi v.*

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6 [redacted]

Citigroup Alternative Invs. LLC, No. 08 CV 09774, 2009 WL 1515071, at *1 (S.D.N.Y. May 29, 2009) ("[T]he burden is on plaintiff to establish that one of the aforementioned exceptions to CAFA [including the internal affairs exception] is applicable."); *In re Textainer P'ship Sec. Litig.*, No. C 05-0969 MMC, 2005 WL 1791559, at *4 (N.D. Cal. 2005) ("[P]laintiff bears the burden of demonstrating that the [internal affairs exception] appl[ies].")

A substantial portion – in each case over 14 pages – of Derivative Plaintiffs' claims concern Pricewaterhouse Coopers' ("PwC") role as auditor to the fund. *Ferber* Compl. at 35-49; *Pierce* Compl. at 35-49; *Morning Mist* Compl. at 49-69. PwC's role clearly falls outside of the "internal affairs doctrine" because PwC is not a limited partner, general manager, manager, or investment manager in the fund. Since the derivative complaints involve both Fairfield Defendants *and* PwC, the internal affairs exception cannot apply to those cases because the claims against PwC do not relate to internal affairs. For example, the court in *In re Am. Int'l Group, Inc.*, 965 A.2d 763 (Del. Ch. 2009), held that:

> In a rather weak attempt to avoid New York law, the Stockholder Plaintiffs assert that PwC's liability relates to the internal affairs of a Delaware corporation and thus is governed by our law under the internal affairs doctrine... Although PwC's role as an auditor relates to the internal affairs of the corporation, PwC was still a contractual agent employed by AIG to carry out certain contractual duties rather than a part of AIG... Because PwC only faces claims for malpractice and breach of contract, rather than claims that it consciously aided wrongful managerial misconduct, I apply New York law to the claims against it.

Id. at 817-822.

Derivative Plaintiffs also attempt to distinguish *Puglisi v. Citigroup Alternative Invs. LLC,* No. 08 CV 09774, 2009 WL 1515071, at *3 (S.D.N.Y. May 29, 2009) (holding that cases relating to the improper promotion and marketing of securities are not solely related to a fund's internal affairs) on the basis that the derivative complaints here purportedly do not contain allegations of "improper marketing and promotion." To the contrary, the derivative complaints here are replete with allegations relating to improper marketing. These include, *inter alia*:

- "FGG, and its other related entities, marketed the Fund to investors and purported to conduct due diligence on behalf of the Fund. FGG posted on its website a letter dated January 8, 2009 to its investors, stating that as of November 1, 2008, FGG had total assets under management of approximately $14.1 billion, of which approximately $6.9 billion was invested in vehicles connected to BMIS. Plaintiffs believe that nearly all of Greenwich Sentry Partners' assets invested with BMIS have been lost." *Pierce* Compl. at ¶ 5.

- "In documents issued in connection with its funds, FGG represented that it conducted 'deeper and broader' due diligence and performed continued risk monitoring of its fund managers, which include Madoff and BMIS. This was untrue." *Pierce* Compl. at ¶ 6.

- "While touting their 'higher level' of due diligence over their competitors, the Fund Defendants, in fact, allowed Madoff and BMIS to go unchecked, while issuing false reports to investors presenting nonexistent, or, at the very least, highly inflated, profits, and collecting fees based on such fictitious profits." *Pierce* Compl. at ¶ 7.

- "According to FGG's website and a marketing brochure provided to potential investors and also available on its website, FGG's 'deeper and broader' due diligence included . . . The FGG brochure goes on to say that 'the purpose of this ongoing activity is to ensure that the fund continues to follow its investment methodology – and constraints – and otherwise acts in accordance with the operational and risk framework that was approved during the due diligence phase.'" *Pierce* Compl. at ¶ 38.

- "FGG's website and marketing brochure explain that 'Operational failures, including misrepresentation of valuations and outright fraud, constitute the vast majority of instances where massive investor losses occur.' Operational risk, according to FGG, 'refers to the risk of loss resulting from inadequate or failed internal processes, human resources, or systems or from external events.'" *Pierce* Compl. at ¶ 56.

- "FGG violated its duties of candor and loyalty to the Fund and Limited Partners by falsely representing that it performed a 'higher level' of 'deeper and broader' pre-investment due diligence and post-investment multifaceted risk monitoring of its managers than its competitors." *Pierce* Compl. at ¶ 98.

IV. DERIVATIVE PLAINTIFFS SEEK MONETARY RELIEF

Citing *Ross v. Bernhard*, 396 U.S. 531 (1970), Derivative Plaintiffs argue that because they are suing *derivatively*, they cannot be seeking "monetary relief." Reply at 7. But *Ross* actually contradicts their argument. In fact, the *Ross* court determined that the relief sought in connection with the derivative claim was indeed, at least in part, for money damages. *Id.* at 543 ("In the instant case we have no doubt that the corporation's claim is, at least in part, a legal one. The relief sought is money damages."). There can be no doubt that a shareholder in a derivative proceeding may seek and obtain monetary damages. *See, e.g., Liman v. Midland Bank Ltd.*, 309 F. Supp. 163 (S.D.N.Y. 1970); *Norte & Co. v. Huffines*, 288 F. Supp. 855 (S.D.N.Y. 1968), *aff'd in part rev'd in part,* 416 F.2d 1189 (2d Cir. 1969). Derivative Plaintiffs' claim to the contrary is simply wrong.

CONCLUSION

For the foregoing reasons, Moving Plaintiffs' request to remand *Ferber*, *Pierce*, and *Morning Mist* to State court should be denied.

Dated: September 8, 2009
New York, New York

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendants. This Document Relates To: 09-CV-2588 (VM) (*Pierce* Action)	MASTER FILE NO. 09-CV-0118 (VM)

FURTHER SUPPLEMENTAL DECLARATION OF PAUL J. SIRKIS

I, Paul J. Sirkis, make this declaration pursuant to 28 USC § 1746. I hereby state as follows:

1. I am an attorney associated with the law firm of Simpson Thacher & Bartlett LLP, counsel for certain Defendants in the above-captioned action. I submit this Further Supplemental Declaration and exhibits hereto in support of FGA's Sur-Reply in Further Opposition to Derivative Plaintiffs' Motions to Remand. I am fully familiar with the matters stated herein based on personal knowledge or review of files in the possession of my firm.

2. Pursuant to an order issued by Magistrate Judge Theodore H. Katz on May 13, 2009 (the "Order"), subpoenas were served on 9 non-party limited partners in GSP (the "Subpoenas"), including on Triumph Multi-Series Fund LP, c/o Calhoun Asset Management, 8770 West Bryn Mawr Avenue, Suite 1300, Chicago, IL 60631 ("Triumph"); and on Accucom Consulting Inc., c/o John Narducci, Trustee, 250 Post Road East, Westport, CT 06880 ("Accucom").

3. Attached hereto as Exhibit 1 is a true and correct copy of a subsequent Subpoena response received from Calhoun Asset Management, the General Partner of Triumph, on

August 30, 2009, indicating that all of the investors in Triumph listed in their Subpoena response dated June 25, 2009, were investors in Triumph as of December 31, 2008.

4. Attached hereto as Exhibit 2 is a true and correct copy of a subsequent Subpoena response received from Accucom on September 8, 2009, listing 10 current employees of Accucom who participate in the Accucom Profit Sharing Plan.

5. In my previous Declarations dated July 27, 2009 and July 31, 2009, I calculated that there were 111 current beneficial equity holders in Greenwich Sentry Partners ("GSP"). This calculation was based in part on my assumption that the 12 beneficial equity holders in Accucom Profit Sharing Plan reported by Accucom all were current holders. As set forth in paragraph 4 above, Accucom Profit Sharing Plan has now advised that only 10 of the 12 are current holders. Accordingly, the number of current GSP beneficial equity holders is revised to 109.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 8, 2009

Paul J. Sirkis